IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

THURSDAY, THE 11TH JANUARY 2007 / 21ST PAUSHA 1928

Crl.MC.No. 3560 of 2006()

CRRP.60/2004 of ADDL.DISTRICT COURT (ADHOC)III, MANJERI
CMP.8/01 OF SUB DIVISIONAL MAGISTRATE, TIRUR

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PETITIONER:

KOLAMBIL KHADER,
S/O.MAMMI, ATHAVANAD AMSOM, DESOM AND VILLAGE,
TIRUR TALUK.

BY ADV. SRI.TOM K.THOMAS

RESPONDENTS:

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1. STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

2. PERADIPARAMBIL SETHUMADHAVAN,
S/O.RAMAN VAIDYAR, ATHAVANAD AMSOM,
DESOM AND VILLAGE, TIRUR TALUK.

BY PUBLIC PROSECUTOR SRI.GIKKU JACOB

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 11/01/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R.BASANT, J

Crl.M.C.No.3560 of 2006

Dated this the 11th day of January, 2007

ORDER

What types of injuries posed by a standing tree can attract action under Section 133 of the Code of Criminal Procedure ? Does the mere inconvenience caused in the growth of the trees in the adjacent property justify the invocation of the powers under Section 133 Cr.P.C by the Sub Divisional Magistrate ? These are the questions that are raised in this Crl.M.C.

2. Proceedings were initiated against the petitioner on the basis of a complaint filed by the 2nd respondent before the Sub Divisional Magistrate. In that complaint, it is alleged that the trees standing in the property of the petitioner herein are causing nuisance to the 2nd respondent. The precise allegations raised are that these trees impede the proper growth and development of the trees in the property of the 2nd respondent. Of course, there is a further allegation that when the wind blows, there is possibility of the branches falling and causing injury to the employees of the 2nd respondent and the improvements in his properties.

3. On receipt of that complaint, the Sub Divisional Magistrate forwarded the complaint to the Village Officer and his report was sought. The village officer inspected the property and

submitted his report dt.15.3.01. In that it is reported that there was an agreement between the parties. But the petitioner had not complied with the undertaking to cut down all the branches as agreed by him earlier. About the nature of the nuisance, the Village Officer reported that the overhanging branches/trees are impeding the proper growth of the trees in the 2nd respondent's property. Significantly though an allegation is raised in the complaint filed by the 2nd respondent that the branches of the trees are likely to fall when wind blows and thereby cause injury to the 2nd respondent's employees and the improvements in his property, this allegation is not supported or reported in the report of the Village Officer. A conditional order was passed by the Sub Divisional Magistrate dt.20.3.01 and the relevant observation/conclusion is expressed in the following words.

> "Whereas it has been made to appear to me that the branches of certain trees such as a Banian tree, two mango trees and three cashew trees standing in the boundary of the courter petitioner in R.S.No.172/2C, 5, 6 of Athavanad Amsom leaning on the property of the petitioner **causes much nuisances to the petitioner and such nuisance is still continuing.**
>
> And whereas it has been made to appear to me that, it is necessary to cut and remove those branches of the said trees **considering the agonies of the petitioner."**
>
> (emphasis supplied)

4. Thereupon the petitioner entered appearance and filed his objections. He denied the allegations raised in the complaint. He denied the grievance against him that he had not complied with the directions of the Village Officer. He alleged that the statement allegedly submitted by him to the Village Officer has been tampered with and forged.

5. Thereupon the Sub Divisional Magistrate appears to have questioned the petitioner. He denied the allegations. Thereupon the Sub Divisional Magistrate examined the petitioner herein. He was cross examined also. No evidence whatsoever was adduced on the side of the 2nd respondent. Relying on the complaint filed by the 2nd respondent, the report submitted by the Village Officer and the statements made by the petitioner when he was cross examined, the Sub Divisional Magistrate proceeded to pass the impugned order under Section 138 Cr.P.C. The conditional order was made absolute.

6. The order was challenged before the learned Sessions Judge. The learned Sessions Judge turned down the challenge against the final order under Section 138 Cr.P.C.

7. Arguments have been advanced by the learned counsel for the petitioner. The respondent, though served, has not entered appearance.

8. The learned counsel for the petitioner contends that at any rate, even accepting the report of the Village Officer, which is the sole item of material in favour of the 2nd respondent, no order under Section 133 Cr.P.C could have been passed by the Sub Divisional Magistrate. The vital ingredient of Section 133(1)(d) Cr.P.C is not satisfied and therefore the impugned order is one without jurisdiction, requisite fundamental facts having not been established.

9. The counsel contends that under Section 133(1) (d) Cr.P.C, which I extract below, it is essential that there must be imminent danger of the tree falling and thereby causing injury to persons living or carrying on business in the neighborhood or passing by. If this ingredient is not satisfied, no order – conditional or final, can be passed under Section 133/138 Cr.P.C. This in short is the plea. I extract below Section 133(1) (d).

> "Section 133 (1): Whenever a District Magistrate or a Sub divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government on receiving the report of a police officer or other information and on taking such evidence (in any) as he thinks fit, considers-
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> (a) .....
>
> (b) .....
>
> (c) .....
>
> (d) that any building, tent or structure, **or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or**

> **passing by**, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or "
>
> (emphasis supplied)

It is true that Section 133 comes in Ch.XB of the Code of Criminal Procedure with the sub chapter heading of "public nuisance". It is of course trite by now after **Balakrishnan Nambiar v. Madhavan Nambiar** [1980(5) KLT 425] that danger to the general public need not be alleged or proved to justify action under Section 133(1)(d) Cr.P.C. The language of Section 133(1)(d) Cr.P.C makes it very clear that it is enough if the tree is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by. Even one person over whose building/property, the tree of the neighbour leans and poses a threat of falling and thereby causing injury to himself alone can initiate proceedings under Section 133(1)(d) Cr.P.C and get a favourable order. It is not necessary that the falling of tree must pose danger to all the members of the public together. Even the threat of injury to one person posed by the likelihood of the tree falling will attract an order under Section 133 (1)(d) Cr.PC.

10. Of course, the expression "tree" will have to be understood realistically and even when branch of a tree is likely to fall

or fruit or leaves of a tree are likely to fall, it will have to be held that though the entire tree is not likely to fall, threat or likelihood of a portion of the tree falling will also attract action under Section 133(1)(d) Cr.P.C. But the crucial question here is when there is no threat of the tree or a portion of the tree falling and thereby causing injury, is action under Section 133(1)(d) Cr.P.C liable to be initiated.

11. The language of Section 133(1)(d) makes it very clear that the threat must emanate from the likelihood of the tree falling and not any other form of injury. In the instant case, the Village Officer's report significantly does not at all indicate or remotely suggest that the tree or any portion of it is likely to fall and thereby cause injury. In short, the injury apprehended in Section 133(1)(d) Cr.P.C must be imminent and most stem from the likelihood of the tree falling and not from any other type of injury resulting from a standing tree which is not likely to fall.

12. Under the civil law, a person aggrieved may have the right to abate the nuisance himself or seek the interference of the court to abate such nuisance caused by the branches of the tree trespassing into the aerial space above property over which he has rights. It is not necessary to consider such rights of the individual under the civil law to abate such nuisance either with the intervention of the court or without. Section 133 Cr.P.C though it comes under the Chapter

”public nuisance” does not certainly cover a case where nuisance is likely to result from the standing tree in the property of a neighbour which may cause obstruction of sun light etc. to the neighbour and impede the growth of trees or the raising of cultivation in his property. The mischief which is sought to be remedied under Section 133 Cr.P.C must be of the specified nature falling within clauses (a) to (f) of Section 133 (1) Cr.P.C and cannot certainly cover cases like the instant one where the apprehension itself is only that the standing tree, with no likelihood of it falling, obstructing the growth and development of cultivation/trees in the neighbour’s property.

13. I do of course note that in the complaint filed a vague allegation has been raised that if wind blows, the branches are likely to fall and cause injuries. But that assertion is stoutly denied and is not supported by the report of the Village Officer or any data placed before the Sub Divisional Magistrate. Even during the cross examination of the petitioner, no specific or definite suggestion on that aspect is put to the petitioner by the 2nd respondent.

14. I am called upon to invoke the jurisdiction under Section 482 Cr.P.C and if really the petitioner had undertaken to cut the trees before the Village Officer and he had not complied with that undertaking, it will seriously have to be considered whether the extra ordinary inherent jurisdiction under Section 482 Cr.P.C deserves to

be invoked in favour of the petitioner. For this purpose, I have looked into the alleged statement, which was given by the petitioner. It is available at page 19 of the records of the Sub Divisional Magistrate. The statement as it originally stood is that the branches of trees have been cut as directed by the Village Officer. There is an alteration made therein which is unauthenticated and in a different hand converting it into a future undertaking to cut down trees which may be directed by the Village officer. That crucial alteration does persuade me to hold that the said alleged undertaking and the alleged violation thereof cannot persuade this Court not to invoke the jurisdiction under Section 482 Cr.P.C, when the crucial requirement of Section 133(1)(d) Cr.P.C is not seen satisfied.

15. In the result, this Crl.M.C is allowed. The impugned orders passed under Section 138 Cr.P.C by the Sub Divisional Magistrate and the order passed by the learned Sessions Judge upholding the same are set aside.

(R.BASANT, JUDGE)

rtr/-